UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Tri-State Generation and	)	Docket No. ER19-2440-000
Transmission Association, Inc.	)	Docket No. ER19-2441-000
	)	Docket No. ER19-2442-000
	)	Docket No. ER19-2444-000
	)	Docket No. ER19-2470-000
	)	Docket No. ER19-2474-000
Thermo Cogeneration Partnership, L.P.	)	Docket No. ER19-2443-000

NOTICE OF INTERVENTION AND PROTEST OF THE
COLORADO PUBLIC UTILITIES COMMISSION

Pursuant to Rules 211 and 214(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] the Colorado Public Utilities Commission hereby submits this Notice of Intervention and Protest in response to the filings made by Tri-State Generation and Transmission Association, Inc. ("Tri-State") and its subsidiary Thermo Cogeneration Partnership, L.P. ("Thermo Cogen") in the above-captioned proceedings. As a state regulatory commission under Rule 214[2] which has jurisdiction over "every public utility in [the] state" of Colorado[3]—including Tri-State—the Colorado Public Utilities Commission ("CoPUC") is entitled to intervene in this proceeding upon notice.

As explained below, the CoPUC requests that the Commission dismiss all of the filings presented in the above-captioned proceedings as procedurally unsound, premature, incomplete, and jurisdictionally problematic. Tri-State has not disclosed to the CoPUC or the Commission the identity of the "New Member(s)" it may soon admit—the key event that Tri-State alleges will result in it becoming a Commission-jurisdictional public utility under federal law. That shift has

[1] 18 C.F.R. §§ 385.211, 385.214(a)(2).
[2] *Id.* at §§ 1.101(k), 385.214(a)(2).
[3] Colo. Rev. Stat. § 40-3-102.

potential preemption implications that are nowhere addressed in the filings that opened the above-captioned proceedings.[4]

As well, these filings implicate unresolved questions of Colorado law that the CoPUC is currently addressing. The CoPUC recently noticed proposed rules that require wholesale electric cooperatives to apply for and receive CoPUC approval of their integrated or electric resource plans.[5] This rulemaking is applicable only to Tri-State, and not to other investor-owned utilities in Colorado. The notice acknowledges that Tri-State has taken steps to seek FERC rate regulation and asks Tri-State and other interested persons whether a CoPUC decision denying or altering Tri-State's resource plan would be binding on Tri-State, what the regulatory consequences would be for Tri-State if it departs from a CoPUC approved resource plan, to identify the specific Colorado energy policy goals applicable to Tri-State, and whether and how various methodologies Tri-State currently employs will change as a result of FERC rate regulation.[6] These resource planning questions concern not only the ability of parties to participate, but also whether the CoPUC retains authority to enforce resource plan findings of an approved generation mix.

Additionally, at its August 21, 2019 weekly meeting, the CoPUC will discuss opening a docket to determine two unsettled questions: (1) whether the CoPUC must approve the addition of any "New Member" to Tri-State and (2) what jurisdictional consequences will flow from that addition.

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[4] *See, e.g., Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, Inc., 707 F.3d 883, 889 (7th Cir. 2013) (illustrating the consequences of another cooperative's loss of its Section 201(f) exemption from Commission regulation).

[5] *See In the Matter of the Proposed Rules Implementing Senate Bill 19-236 Regarding Integrated or Elec. Res. Plans for Wholesale Elec. Cooperatives*, Notice of Proposed Rulemaking, Colorado Public Utilities Commission, No. 19R-0408E, 2019 WL 3556789 at *1 (July 31, 2019).

[6] *Id. at *10–11.*

Should Tri-State wish to pursue adding a "New Member" whose entry would have such important jurisdictional consequences, the CoPUC believes that the proper approach would be for Tri-State to first respond to the questions presented in the above-referenced notice, and second, for the CoPUC to answer the related state law questions.

Given the CoPUC's complex jurisdictional history specifically with respect to Tri-State, a subject explained in more detail below, these important, predicate state law issues should be addressed before this Commission is asked to rule on the host of tariffs and contracts filed in the above-captioned proceedings. Should state regulatory approval turn out not to be necessary, or should it be sought and then granted, Tri-State could then file a subsequent petition for declaratory order here at this Commission to establish the prospective basis for federal jurisdiction over Tri-State as a public utility under the Federal Power Act.

At that point, if the combined result of these proceedings indicated that Tri-State no longer qualifies for an exemption from federal regulation under Section 201(f), then it would be appropriate for Tri-State to file a package of tariffs and contracts that effectively reorganize it as a public utility regulated by this Commission. Tri-State's rush to file scores of tariffs and contracts under Section 205—a clear attempt to force this Commission to render numerous expedited decisions on only a partial record—should not be rewarded.

The CoPUC appreciates the close consideration that this Commission will give to the complex issues in the seven dockets that Tri-State has sought to open here. To assist the Commission in disposing of these issues, the CoPUC has compiled all of its protests and arguments into one integrated document that it will file in all of the above-captioned proceedings. All seven

dockets suffer from the same threshold procedural and jurisdictional flaws and should be dismissed on that basis, as explained in the first protest subsection below.[7]

However, should the Commission not dismiss these filings, in the alternative and at a minimum, the CoPUC requests that the Commission issue a deficiency letter applicable to all dockets that advises Tri-State of its failure to explain a) the identity of the "New Member(s)" it plans to admit and why admitting that entity or entities changes its jurisdictional status; b) the basis for Tri-State's belief that Colorado law permits Tri-State to add non-cooperative members without state regulatory approval; and c) the proceeding-specific plans, intentions, and policies of Tri-State not adequately presented for Commission consideration in its initial filings (*e.g.*, how Tri-State's application for market-based rate authority would change after the admission of "New Member(s)").[8] These are not points of fact that are raised only by protesting parties in these proceedings—these are issues about which the Commission must have more information before it makes any initial determinations about Tri-State's filings, aside from dismissal.

After addressing the cross-cutting threshold issues common to all of Tri-State's filings in the first protest subsection below, this protest then proceeds to detail the docket-specific issues that the CoPUC wishes to raise should the Commission decide to proceed to the substance of Tri-State's filings.

I. NOTICE OF INTERVENTION

The CoPUC is a regulatory body of the State of Colorado having jurisdiction over "public utilities," including "electric corporations" in the State of Colorado, pursuant to Article XXV of

[7] *See PP&L Inc.*, 95 FERC ¶ 61,160 at 61,520 (2001) ("we … reject a rate application where … the application is patently deficient").

[8] *See id.* (explaining that a deficiency letter may be appropriate "to cure specific omissions from a rate application that otherwise substantially complies with our filing requirements").

the Constitution of the State of Colorado and Title 40 of the Colorado Revised Statutes. Pursuant to Article XXV and Colo. Rev. Stat. § 40-3-102, the CoPUC has authority to regulate the facilities, service and rates and charges of every public utility in the state, including public utilities engaged in the sale of electric energy within Colorado. The CoPUC is authorized by Colo. Rev. Stat. § 40-7-110(2) to appear and represent the interests of the people of the State of Colorado in all matters and proceedings involving any public utility pending before any commission of the United States, including to intervene in, protest, and advocate the denial of any petition, application, or other proceeding. The CoPUC is a "state commission," as that term is defined in 18 C.F.R. § 1.101(k) and within the meaning of Rule 214(a)(2) of this Commission's Rules of Practice and Procedure.[9]

Pursuant to Rule 214(a)(2), the CoPUC submits this Notice of Intervention in the above-captioned dockets. Service of documents and communications should be made on the following:

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II. PROTEST

Pursuant to Rule 211 of this Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211, the CoPUC submits this protest to the tariff and contract filings of Tri-State Generation

[9] 18 C.F.R. § 385.214(a)(2).

[10] The CoPUC respectfully requests waiver of the Commission's regulations at § 385.203(b)(3) to permit more than two persons to be designated on the official service list in this proceeding for the CoPUC.

and Transmission Association and Thermo Cogeneration Partnership, L.P. in the above-captioned dockets. This protest has been served on the representatives of those entities listed in the Commission's official service lists in these proceedings.

A. Protest Issues Regarding Procedural and Jurisdictional Questions Applicable to All Dockets (ER19-2440 through ER19-2444; ER19-2470; ER19-2474)

All of Tri-State's filings in the above-captioned proceedings suffer from the same patent flaw—they fail to give this Commission and interested parties full information with respect to Tri-State's future plans and the resulting jurisdictional consequences. Tri-State does not identify the entity or entities it claims will soon join its membership and make it subject to the Commission's jurisdiction. Indeed, Tri-State's filings provide no information about these "New Member(s)" at all – the filings omit any details regarding the name(s), corporate form(s), state(s) of incorporation, geographic location(s), affiliate(s), assets, *etc.* of these "New Member(s)", or their alleged plans to join Tri-State in the next few weeks. Even though Tri-State advances no ascertainable facts to support its claim that it will soon no longer be eligible for the exemption from Commission jurisdiction provided by Section 201(f), that claim is *the central point on which all of the above-captioned proceedings are premised*. In the absence of these facts, the Commission cannot grant Tri-State the relief it seeks in any docket, and the Commission should dismiss these filings. Tri-State's various rate "proposal[s] lack[] the information required for the Commission to make any determination but rejection."[11]

(1) Tri-State's Section 205 Filings Fail to Address Key, Uncertain Jurisdictional Questions

Tri-State explicitly seeks in the above-captioned proceedings to change the jurisdictional status quo. In its lead filing, Tri-State explains that on account of its past experiences with state

[11] *See Midwest Indep. Transmission System Operator, Inc.*, 103 FERC ¶ 61,217 at P 7 (2003).

regulation and its uncertain regulatory future, "Tri-State's Board has voted overwhelmingly in favor of Tri-State's becoming subject to rate regulation by a single regulatory body, the FERC,"[12] to the exclusion of state regulators. Given Tri-State's limited disclosures regarding its future plans, however, neither the CoPUC nor this Commission can be certain that Tri-State has the unilateral authority to admit "New Member(s)" and change its jurisdictional status on its own. In other words, Tri-State has failed to explain how its intentional jurisdictional shift does not first require prior state regulatory approvals.[13] As mentioned above, the ongoing CoPUC rulemaking and the upcoming discussion continue the process of sorting out these complex issues.

While newly-formed public utilities may have a relatively free hand to structure their business operations in a way that leads to a certain regulatory status, Tri-State is not writing on a blank slate—it has been in existence since 1952. Non-profit generation and transmission corporations or associations like Tri-State are public utilities under Colorado law, and as such are subject to the jurisdiction of the CoPUC.[14] Public utilities like Tri-State must obtain approval from the CoPUC before engaging in any asset sale, assignment, or lease outside the normal course of business, including sales, assignments, or leases that involve "any certificate of public convenience and necessity or rights obtained under any such certificate."[15] And the Colorado Legislature has made it the duty of the CoPUC "to govern and regulate all rates, charges, and tariffs of every public

[12] *See* Transmittal Letter in ER19-2440-000 at 3-5.

[13] Tri-State seeks to draw parallels with prior instances where non-jurisdictional cooperatives sought approval of a package of initial rates by this Commission, *see id.* at 5 & n.13, but both of the voting Commission orders cited there dealt with cooperatives who were about to repay their Rural Utilities Service ("RUS") debt. *See Wabash Valley Power Ass'n*, 107 FERC ¶ 61,327 at P 3 (2004); *Wolverine Power Supply Coop., Inc.*, 81 FERC ¶ 61,369 at 62,752 (1997). In neither case was the Commission asked to explore the kind of complex uncertainties presented by the sort of incomplete filings that Tri-State offers here.

[14] Colo. Rev. Stat. § 40-1-103(2)(a).

[15] Colo. Rev. Stat. § 40-5-105(1).

utility of this state to correct abuses," and to "generally supervise and regulate every public utility in this state," with the authority to do "all things … which are necessary or convenient in the exercise of such power."[16]

Just a few years ago in a proceeding at the CoPUC, Tri-State did not contest the CoPUC's statutory jurisdiction over it as a public utility, nor did it contest the CoPUC's statutory ability to hear complaints against Tri-State alleging that its rates are unjust, unreasonable, discriminatory, and preferential.[17] In fact, Tri-State represented to a federal court that it is subject to a "comprehensive scheme" of state regulation in Colorado.[18]

As a historical matter, it is true that the CoPUC has not fully regulated Tri-State to the limits of the CoPUC's broad statutory authority, out of respect for "the cooperative model of governance that has served [Tri-State's] members since [its] inception."[19] But now Tri-State seeks to change that model, and admit a "New Member … that will not be an electric cooperative or a governmental entity and will not directly or indirectly be wholly-owned by an electric cooperative or a governmental entity."[20] Nowhere in its filings before this Commission does Tri-State explain what this means for its state-law obligations, other than to note that its Board desires to be "subject to rate regulation by a single regulatory body, the FERC."[21]

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[16] Colo. Rev. Stat. § 40-3-102.

[17] *See La Plata Elec. Assoc., Inc. et al. v. Tri-State Generation & Transmission Ass'n Inc.*¸ Decision No. C14-0006-I at P 25 (Dec. 18, 2013), Proceeding 13F-0145E. In that proceeding Tri-State made various other jurisdictional arguments under state and federal law, *see id.* at PP 26-50, but did not contest the idea that it is a public utility subject to the CoPUC's jurisdiction.

[18] *Id.* at P 50 ("50. Tri-State recently represented to the federal court sitting in Colorado that its rates are subject to a 'comprehensive scheme of state constitutional amendments, statutes, and regulations that govern Colorado's public utilities.' We interpret this statement as an acknowledgement of at least some room for [CoPUC] regulation of its rates." (footnote omitted)).

[19] *Id.* at P 55

[20] Transmittal Letter in ER19-2440-000 at 2.

[21] *Id.* at 5.

(2) Dismissal is the Appropriate Remedy Here

Because Tri-State has not yet informed the CoPUC as to whether any state regulatory approvals will be sought or needed regarding its plans to admit "New Member(s)"—nor has it indicated anything of the sort to this Commission—it is not possible at this point for the Commission or any interested party to determine whether Tri-State's Section 205 filing is ready for Commission action or whether it is instead premature, incomplete, and/or contingent on prerequisite state regulatory approvals.

This Commission has been very clear in the past that as "a threshold matter, all rate applicants have an affirmative obligation to adequately support their rate applications."[22] Rate applications that are "patently deficient" because they do "not meet threshold filing requirements" may be rejected by the Commission.[23] This includes situations where a rate "proposal lack[s] the information required for the Commission to make any determination but rejection."[24] And in contested dockets, rejection is appropriately done via Commission order.[25] Indeed, the law on this point has been clear for decades – the Commission may reject filings for "defects of form" as well as for problems "of substantive law," and in the latter case can be excused from holding "a vast proliferation of hearings" on rates that may be legally flawed.[26]

[22] *PP&L*, 95 FERC ¶ 61,160 at 61,159 (2001).

[23] *Id.* at 61,520.

[24] *Midwest Indep. Transmission System Operator, Inc.*, 103 FERC ¶ 61,217 at P 7 (2003). An "answer attempting to support the proposed rate[s]" may or may not be sufficient to rescue a filing of that sort. *See id.* at P 6.

[25] *See, e.g., PP&L*, 88 FERC ¶ 61,235 (1999) (deciding to "reject the filing for failure to provide support for its assertion that the low-voltage facilities operate as an integrated system").

[26] *See Municipal Light Boards of Reading and Wakefield, Mass v. Federal Power Commission*, 450 F.2d 1341, 1346 (D.C. Cir. 1971) (quoting in part *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, 44 (1964)).

Finally, the Commission should err on the side of caution when presented with a filing that has not fully explained all the threshold legal issues. If the Commission were to accept Tri-State's filings, only to later find out that it had "erred in failing to … reject a rate filing that was a nullity" due to a threshold legal error, the Commission would then have to unwind the rate structures it had mistakenly approved.[27]

Although the CoPUC strongly believes that the proper course here is for the Commission to reject Tri-State's filings and dismiss them in their entirety, in order not to waive any substantive objections, the CoPUC also addresses the substance of each Tri-State docket below.

B. Protest to Tri-State's Stated Rate Filing – Docket No. ER19-2440

The "stated rates" that Tri-State submitted in Docket No. ER19-2440 suffer from several flaws. First, they are not fully "stated" – many elements and components of the rates are expressly left to the discretion of Tri-State, or must be negotiated between Tri-State and its members. Acceptance of these elements would improperly delegate to Tri-State the function of setting rates. Second, Tri-State's proposed tariff delegates to Tri-State's Board of Directors responsibility for annually updating the revenue requirement and the rates charged to Tri-State members. But Tri-State has filed a stated, rather than formula rate; thus, it is not permitted to simply re-calculate rates charged to members without submitting them to the Commission for a determination of their justness and reasonableness. Third, the rates improperly impose limits on the output of distributed generation owned or controlled by Tri-State's member cooperatives.

(1) Elements of Tri-State's "stated rate" are expressly left unstated.

Tri-State's "FERC Electric Tariff Volume 1" contains a series of Rate Schedules applicable to various programs and types of electric service. These Rate Schedules expressly reserve to Tri-

[27] *See id.* (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)).

State the determination of certain rates. This is incompatible with the purpose of a stated rate, and Commission approval of these Schedules would improperly delegate to Tri-State authority to unilaterally re-state its rates.

For example, Tri-State's proposed Rate Schedule S – Standby Service provides that the Backup Charge for Energy will be the "[g]reater of the current [stated] Class A Energy Rate … or market price of wholesale electricity as determined by Tri-State using commonly-used locational price indices."[28] In another example, Tri-State's proposed Rate Schedule LDR-1 – Load Development and Retention Rate will be offered to Member Systems to incentivize them to retain or attract new load. Rate Schedule LDR-1 provides that the incentive rate "will be established through negotiations between Tri-State and the Member System and will be based on factors including, but not limited to, the price of competing energy sources, the benefit of the load to Tri-State and the Member System, and the economic impact of the load to the area in which it is located."[29] In a third example, Tri-State's proposed Rate Schedule R – Renewable Resource Program describes a program whereby Tri-State will retire renewable energy credits ("RECs") on behalf of its Member Systems. The portion of that Schedule entitled "Rate" provides, in its entirety, "The rate [for RECs] will be determined by Tri-State on an annual basis and the Member System will be notified in writing by Tri-State each fall for the rate that will be in effect for the subsequent calendar year."[30]

In each of these examples, the rate schedule that Tri-State has asked the Commission to approve neither states the applicable charge, nor lays out a formulary means of calculating the charge. There is no means for the Commission to assess the justness and reasonableness of the

[28] Tri-State Electric Tariff Vol. 1 at 15.
[29] Tri-State Electric Tariff Vol. 1 at 21.
[30] Tri-State Electric Tariff Vol. 1 at 12.

charges that will be assessed to Tri-State's customers under these schedules because neither the charges, nor the calculation by which they will be derived, has been presented for Commission review.

The process of annual, unilateral changes to the rates charged to Tri-State members is inappropriate under a stated rate. Although this docket is captioned as a "stated rate" proceeding, and Tri-State's proposed tariff expressly notes that the rates "are not developed on a formulary basis,"[31] the tariff appears to permit Tri-State to unilaterally alter charges to customers each year, without obtaining Commission approval of the charges. This is not a "stated rate," and should not be approved as such. While formula rates permit the utility to make annual updates subject to Commission oversight, Tri-State's proposed tariffs do not include the calculations necessary to support a formula rate nor do they include challenge provisions that allow interested parties to contest the annual update.[32] In sum, Tri-State is seeking the level of flexibility permitted by formula ratemaking, which is available only because of the transparency a formula provides, without submitting a formula for approval.

Tri-State's proposed tariff describes the process by which Tri-State's Board of Directors prepared the budget underlying the revenue requirement presented in support of its stated rates. It states, "Tri-State will budget each year and *set rates* to its Members expected to attain" certain financial goals.[33] Although it is possible that Tri-State intends this language to refer only to the process by which its Board of Directors will determine whether it is necessary to seek approval for

[31] Tri-State Electric Tariff Vol. 1 at 2.

[32] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 at P 18 (2013) ("We also require that the formula rate protocols afford parties the opportunity to engage in a well-defined informal challenge process.").

[33] Tri-State Electric Tariff Vol. 1 at 4.

an updated stated rate, the plain language of the tariff appears to allow Tri-State to simply update the rates its members will be charged.

Some cooperatives have sought approval of a *formula rate*, where the formula is populated using the cooperative's budget, as determined by its board of directors.[34] But Tri-State has not pointed to any precedent permitting similar unilateral updates of a *stated* rate. Moreover, the approved formula rates for Wabash Valley Power Association and Old Dominion Electric Cooperative include the formulae that are used to convert the budget developed by their respective boards of directors into charges to ratepayers. In contrast, the stated rate submitted by Tri-State includes no similar formulae.

The possibility that Tri-State may intend to unilaterally update the charges applicable to its members is more than hypothetical. The genesis of Tri-State's filing is the alleged addition of the "New Member(s)." The addition of the "New Member(s)" will almost certainly alter Tri-State's budget and revenue requirement, and thereby the rates that would be just and reasonable. Tri-State's filing is clear that the "stated rates" contained in its tariff are identical to rates that have been in effect since 2017 – in other words, the stated rate does not reflect the addition of the "New Member(s)." Tri-State may believe its proposed tariff gives it the flexibility to update the rates, after Commission approval, to reflect that change in its membership. But that is not the function or purpose of a stated rate.

In addition, because Tri-State's proposed stated rates are based on its historical revenue requirement, not accounting for the addition of the "New Member(s)", but will take effect only after the "New Member(s)" join Tri-State (at which point the revenue requirement will change),

[34] *See, e.g., Wabash Valley Power Ass'n, Inc.*, 110 FERC ¶ 63,055 (March 23, 2005); *see also Old Dominion Elec. Coop.*, FERC Docket No. ER19-1551, Letter Order (June 3, 2019) (accepting updated formula rate).

Tri-State's stated rates are at risk of being unjust and unreasonable immediately upon becoming effective. The Commission should not approve them.

(2) Tri-State improperly limits the output that member cooperatives may generate using distributed generation.

Tri-State's Statement BL incorporates by reference a series of Board of Directors' Policies. The "Member System Distributed Resource Policy" permits Member Systems to own and operate distributed generation ("DG") resources, and choose to either (i) net meter that DG, or (ii) receive bill credits against Tri-State's energy and demand charges for the output of the DG.[35] However, the Policy also provides that "the total output from Member System-owned or controlled resources shall not exceed 5% of the Member's gross energy requirements in any calendar year."[36] This language does not simply limit the *value* of bill credits that a member cooperative may receive; instead, it limits the *quantity* of energy that member cooperatives can generate from DG. This limitation is inconsistent with principles of sound market design and will not produce just and reasonable rates.

First, the limitation improperly restricts overall supply, and is therefore inconsistent with the guiding principle that encourages the entry of new supply resources into FERC-regulated markets.[37] Entry of new supply is critical to a healthy, functional market because it ensures that the market consistently functions to select the most economically efficient resources.

Second, in conjunction with other components of Tri-State's filings, this limitation on member-owned DG may operate to subsidize generation that would otherwise be uneconomic. Specifically, when faced with the steep exit fees that Tri-State has recently attempted to impose

[35] Attachment D, Policy 115, page 1 of 11.

[36] *Id.*

[37] *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 at PP 247 (Oct. 17, 2008).

on members who seek to leave the cooperative,[38] a member cooperative may choose to continue paying for power that is uneconomic instead of investing in DG resources that could meet its requirements more efficiently. The Commission should not approve a tariff that forces member cooperatives to make that choice.

C. Protest to Tri-State's Open-Access Transmission Tariff Filing – Docket No. ER19-2441

In Order No. 888, Order No. 890, and their progeny, the Commission has repeatedly emphasized its "core objective of remedying undue discrimination in the provision of transmission service."[39] The Commission's *pro forma* open-access transmission tariff ("*pro forma* OATT") as amended is the product of now more than two decades of insight on how transmission providers can best operate to foster greater competition in wholesale markets and other attendant public benefits.

However, Tri-State proposes several dozen deviations from the *pro forma* OATT.[40] Though some are ministerial, in general Tri-State must show that its proposed "deviations from the pro forma OATT are just and reasonable" by either explaining "how the deviations in the proposed OATT are consistent with or superior to the *pro forma* OATT" or by fully explaining

[38] *See, e.g., Delta-Montrose Elec. Ass'n v. Tri-State Generation & Transmission Ass'n, Inc.*, CO PUC Docket 18F-0866E, Formal Complaint of Delta-Montrose Electric Ass'n (filed Dec. 6, 2018).

[39] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-D, 129 FERC ¶ 61,126 at PP 1-2 (2009); *see also* Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), *order on reh'g,* Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), *order on reh'g,* Order No. 890-C, 126 FERC ¶ 61,228 (2009); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom*. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS v. FERC*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[40] *See* Attachment C to July, 23, 2019 filing in ER19-2441-000 ("Summary of Deviations from Pro Forma OATT").

"how the *pro forma* provisions are not applicable given the filing party's business model."[41] Given Tri-State's reluctance to fully explain its "New Member" plans, the Commission has not been given full information about Tri-State's business model, and can only judge Tri-State's many deviations against the benchmarks set in the *pro forma* OATT and the practices of other transmission providers. Importantly, where "[m]ultiple provisions" of a party's filing "deviate from the pro forma OATT," it is not unusual for the Commission to generally find that the filer has not met the "consistent with or superior to" standard, and direct further procedures, such as hearings or compliance filings.[42]

(1) The Commission Must Scrutinize Tri-State's Proposed Transmission Formula Rate

Additional factual development is unavoidable here on at least two key issues. While the CoPUC acknowledges that Tri-State proposes to follow most of the same formula rate policies and procedures for its "West" region outside of SPP that it currently implements under the settlement reached in Docket No. ER16-204-002, the Commission must examine that critical underlying assumption—that the SPP formula rate *should* be the basis of transmission rates in Tri-State "West." It is not readily apparent from the face of this preliminary record whether mechanically applying the SPP settlement approach to this different context actually leads to a just and reasonable result in the end. The methodology, structure and rate design of Tri-State's SPP formula rate was accepted by the Commission in the context of a $6.7 million net annual transmission revenue requirement, a $17 million rate base, and a $1.1 million return on that rate base.[43] Here,

[41] *Sagebrush, a California Partnership*, 130 FERC ¶ 61,093 at P 26 (2010); *see also United States Department of Energy – Bonneville Power Administration*, 128 FERC ¶ 61,057 at P 48 (2009) (finding a proposed deviation from the *pro forma* OATT acceptable where record indicated that "it is reasonable and beneficial to [the transmission provider's] customers").

[42] *See, e.g., Golden Spread Electric Cooperative, Inc.*, 139 FERC ¶ 61,067 at P 13 (2012).

[43] *See* Summary and Worksheet C in *Joint Offer of Partial Settlement and Settlement Agreement*, Docket No. ER16-204-002 (filed Feb. 22, 2017).

Tri-State proposes a $135 million net annual transmission revenue requirement, a $764 million rate base and a $46 million return on rate base, on the basis of that prior methodology. It is also not apparent from this presentation how Tri-State's proposed "West" rates actually compare to those for its "similar … transmission services" in SPP—despite the Commission rule requiring that comparison,[44] all that parties have been told is that the formula for one should be used as the formula for the other. Yet as parties have pointed out to the Commission before, each proceeding should be "decided on its own merits."[45]

(2) Tri-State Has Not Fully Addressed Compliance with Order 890

In addition, while Tri-State's proposed regional planning processes under the WestConnect Planning Participation Agreement directly address the nine planning principles that Order No. 890 requires all Attachment K planning processes to address,[46] it is not fully clear from Tri-State's filing that its local planning processes also meet those factors.[47] In particular, Order No. 1000's "Public Policy Requirements apply to both the local and regional transmission planning processes" and those processes must "give all stakeholders a meaningful opportunity to provide input and to

[44] 18 C.F.R. § 35.12(b)(3) (requiring the submission of a "comparison of the proposed initial rate with other rates of the filing public utility for similar wholesale for resale and transmission services").

[45] *See Southern Natural Gas Co.*, 119 FERC ¶ 61,003 at P 11 (2007).

[46] The Commission recently explained these requirements in *South Central MCN, LLC*, 164 FERC ¶ 61,114 at P 66 (2018):

> The nine planning principles the Commission directed each transmission provider to address in its Attachment K planning process are: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; (7) regional participation; (8) economic planning studies; and (9) cost allocation for new projects. The Commission also directed transmission providers to address the recovery of planning-related costs. The Commission explained that, although Order No. 890 allows for flexibility, each transmission provider has a clear obligation to address each of the nine principles in its transmission planning process, and all of these principles must be fully addressed in the tariff language filed with the Commission. The Commission emphasized that tariff rules, as supplemented with web-posted business practices when appropriate, must be specific and clear to facilitate compliance by transmission providers and place customers on notice of their rights and obligations.

[47] *See* Attachment K to July, 23, 2019 filing in ER19-2441-000 ("Transmission Planning Process").

offer proposals regarding what they believe are transmission needs driven by Public Policy Requirements."[48] In light of Colorado's renewable energy program, and the resource planning requirements of Senate Bill 19-236,[49] this is another area needing further clarity to ensure that all stakeholders will receive a meaningful opportunity to provide input as a part of Tri-State's transmission planning activities.

D. Protest to Tri-State's Market-Based Rate Tariff Filing – Docket No. ER19-2442 and Thermo Cogeneration Partnership's Market-Based Rate Filing – Docket No. ER19-2443

The Commission has found that setting "effective standards for market-based rates" works to "help customers by ensuring that they are protected from the exercise of market power."[50] Thus sellers of electric energy in interstate commerce may transact at market-based rates provided that they and their affiliates "do not have, or have adequately mitigated, horizontal and vertical market power."[51] The CoPUC understands that by virtue of the distribution of Tri-State's generation resources across five geographic markets, and because of the relatively small size of its portfolio in comparison to the other resources in those markets, by the numbers as presented, Tri-State does not fail the Commission's indicative screens for horizontal market power.[52] It also understands

[48] *South Central MCN*, 164 FERC ¶ 61,114 at PP 111-112.

[49] *See generally In the Matter of the Proposed Rules Implementing Senate Bill 19-236 Regarding Integrated or Elec. Res. Plans for Wholesale Elec. Cooperatives*, Notice of Proposed Rulemaking, Colorado Public Utilities Commission, No. 19R-0408E, 2019 WL 3556789 (July 31, 2019).

[50] *See Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295 at PP 10-11 (2007).

[51] *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, Order No. 861, 168 FERC ¶ 61,040 at P 5 (2019).

[52] *See Application of Tri-State Generation and Transmission Association, Inc. for Market-Based Rate Authority and Certain Waivers and Blanket Authorizations* at 9-16, Docket No. ER19-2442-000 (filed Jul. 23, 2019) ["Tri-State MBR Application"]. Passing both "the pivotal supplier screen and the wholesale market share screen … establishes a rebuttable presumption that the Seller does not possess horizontal market power, while failing either screen creates a rebuttable presumption that the Seller has horizontal market power." Order No. 861, 168 FERC ¶ 61,040 at P 6. Given the similarity between the MBR applications in Docket Nos. ER19-2442 and ER19-2443, and the affiliate relationship between these entities, this filing discusses both dockets together.

that Tri-State has proposed an open-access transmission tariff in Docket No. ER19-2441, and that Tri-State's subsidiary Thermo Cogeneration Partnership L.P. ("Thermo Cogen") owns limited and discrete interconnection facilities, and that both have affirmed that they "have not and will not erect barriers to entry in any relevant wholesale electric market,"[53] which indicates that the entities lack vertical market power as well.

However, before the Commission jumps to the conclusion that Tri-State and Thermo Cogen's market-based rate ("MBR") authority applications should be granted, there are two significant remaining problems with these applications that neither applicant has addressed. First, neither applicant has fully disclosed how the addition of a yet-unnamed "New Member" to Tri-State would impact its generation holdings or contracts. This is not an idle matter – the Commission's MBR rules require that a market power analysis "include an appendix of assets … and an organizational chart … depict[ing] the Seller's current corporate structure"[54] in order to assess whether the indicative screens and other MBR analyses are complete. By acknowledging that an unnamed non-governmental, non-cooperative member will soon join Tri-State, but without providing any details as to how this new entrant or entrants will impact resource holdings, Tri-State and Thermo Cogen effectively ask the Commission to approve an MBR tariff that very well may be based on incomplete information and inaccurate analysis.[55]

[53] Tri-State MBR Application at 16-18.

[54] 18 C.F.R. § 35.37(a)(2).

[55] Indeed, depending on the resource and contract holdings of the "New Member(s)," Tri-State and Thermo Cogen may be forced to file a change in status "from the characteristics the Commission relied upon in granting market-based rate authority." *See* 18 C.F.R. § 35.42(a). Only then would full information about Tri-State's new member admission plans become available. The Commission should not encourage a piecemeal approach to MBR applications; if Tri-State's filings are not dismissed entirely, the Commission should issue a deficiency letter advising Tri-State that its submissions are incomplete without full information about its new member admission plans.

Secondly, as explored in a prior Commission proceeding, Tri-State's existing contractual relationships with its member cooperatives contain a provision that tries to limit its members' purchases of power from qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") to only 5% of their energy requirements.[56] It is not clear to what degree this requirement affects the supply decisions made by Tri-State's members, or how this requirement should factor into the analysis of Tri-State's market power, but the Commission should scrutinize the potential market effects of this possibly market-distorting supply requirement.

E. Protest to Tri-State's Wholesale Electric Service Contracts Filing – Docket No. ER19-2444

As an initial matter, the Commission should devote particular scrutiny to Tri-State's Wholesale Electric Service Contracts ("WESCs"), and all other contracted rates Tri-State has submitted in the various dockets discussed in this Protest. This proceeding represents the first instance in which these contracts have been subject to regulatory review, and the burden is on Tri-State to prove that these contracts meet the "just and reasonable" standard. Although contracts that are the product of "fair, arms-length negotiations" are generally presumed to result in just and reasonable rates, that presumption is based on the assumption that the parties are aware of the jurisdictional status of the contract they are negotiating. The record here demonstrates that these WESCs all date back years, long before the possibility of FERC jurisdiction over Tri-State and its transactions arose. The Commission cannot assume that these contracts are just and reasonable when, at the time they were negotiated, the parties would not have expected the Federal Power Act to apply and the just and reasonable standard to govern.

[56] *See generally Delta-Montrose Electric Association*, 151 FERC ¶ 61,238 (2015); *Tri-State Generation and Transmission Association, Inc.*, 155 FERC ¶ 61,269 (2016).

Moreover, Tri-State must also demonstrate that the negotiations that led to these particular contracts were indeed fair and conducted at arms-length.[57] Recent litigation has revealed that member cooperatives face significant fees if they choose to leave Tri-State and procure their power elsewhere[58]; those exit fees call into question the bargaining power the member cooperatives had available to them in negotiating the WESCs. If member cooperatives' bargaining power was constrained because they faced a choice between paying an unjust rate for wholesale electric services, and paying an uneconomic exit fee, they may have been unable to truly negotiate a just and reasonable rate. At the very least, Tri-State's filing does not make any attempt to support the justness and reasonableness of the WESCs. Once the Commission has accepted a contract, any later modifications to that contract must be in the "public interest"; it is not sufficient that the modification would result in a just and reasonable rate.[59] Therefore, the Commission must be confident – as a result of the review it undertakes in this proceeding – that the WESCs are just and reasonable. It will not have an opportunity to consider that initial question again.

Tri-State's WESCs do not withstand scrutiny. The terms of Tri-State's WESCs conflict with statements concerning their purpose in Tri-State's Petition, and suffer from problems similar

[57] *See Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 546, 554 (2008).

[58] *See, e.g., Delta-Montrose Elec. Ass'n v. Tri-State Generation & Transmission Ass'n, Inc.*, CO PUC Docket 18F-0866E, Formal Complaint of Delta-Montrose Electric Ass'n (filed Dec. 6, 2018) (alleging that Tri-State had set a "punitive exit charge that is unjust, unreasonable, and discriminatory," and stating that, if the exit charge Tri-State calculated for Delta-Montrose was "proportioned out to all Tri-State cooperatives, the collective exit charges would exceed Tri-State's liabilities by billions of dollars, with Tri-State also retaining all of its operating assets"). Delta-Montrose and Tri-State recently reached a settlement in that case, with Delta-Montrose agreeing to pay an exit fee in an amount that will remain confidential until the exit is finalized in 2020. In 2016, a New Mexico-based Tri-State member, Kit Carson Electric Cooperative, withdrew from Tri-State after paying a $37 million exit charge. *See id.*

[59] *See Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 546, 554 (2008).

to those discussed above, in connection with Tri-State's proposed stated rate. The Commission should not adopt the WESCs in their current form.

First, the WESCs contain language that obligates Tri-State's member cooperatives to pay rates established and updated by Tri-State's Board of Directors.[60] At best, this language is ambiguous when read in conjunction with the stated rate tariff Tri-State filed in Docket No. ER19-2440. If both the stated rate tariff and the WESCs are adopted by the Commission, it is not clear which document will govern the rates to be paid by Tri-State members. Although Tri-State's Petition states that the WESCs are intended to govern the parties' obligations to purchase or sell energy to each other, while the stated rate tariff is intended to "tell[] the Member how much it must pay,"[61] that explanation is not borne out in the WESCs themselves. The WESCs do not refer to the stated rate tariff at all; instead, they simply obligate member cooperatives to pay a rate set by the Tri-State Board. Thus, the terms of the WESCs at least overlap – but likely conflict with – the terms of the stated rate tariff Tri-State filed in Docket No. ER19-2440. The Commission should not approve a contract that would create ambiguity when read in connection with a tariff that applies to the same parties.

Second, the language in the WESCs that obligates members to pay rates established by Tri-State's Board of Directors is problematic because there is no exception that applies if those rates differ from rates approved by the Commission. In each of the WESCs, the Member agrees to pay whatever rate the Tri-State Board establishes, and agrees that such rates are incorporated into the

[60] In each of the WESCs, the Member "agrees that the rates from time to time established by the [Tri-State] Board of Directors … shall be deemed to be substituted for rates currently provided and agrees to pay for electric service furnished by [Tri-State] to it hereunder after the effective date of any such revisions at such revised rates." *See, e.g.*, Tri-State Rate Schedule FERC No. 19 (Morgan County Rural Electric Ass'ns, Inc.), Article 3(b).

WESCs themselves.[62] Although this language may have been appropriate in a contract between unregulated entities, it is not appropriate in light of Tri-State's efforts to become regulated. As a regulated entity, Tri-State can charge its customers only the rates filed with and approved by the Commission. The Commission should not approve a contract that would permit a regulated entity to charge, and obligate that entity's customers to pay, non-tariffed rates.

Third, like Tri-State's stated rate, the WESCs limit the quantity of power Tri-State's members may generate using distributed generation ("DG") that the members own or control.[63] As discussed above, this restriction is inconsistent with principles of sound market design, and should not be included in a wholesale contract approved by the Commission. The restriction improperly restricts overall supply, and is therefore inconsistent with the guiding principle that encourages the entry of new supply resources.[64] In addition, the restriction may operate to subsidize generation that would otherwise be uneconomic because Tri-State's member cooperatives, if faced with the steep exit fees that Tri-State has recently attempted to impose, may choose to continue paying Tri-State for power that is uneconomic instead of investing in DG resources that could meet their requirements more efficiently. To the extent this requirement was originally intended to support financing that Tri-State obtained via Rural Utilities Services ("RUS"), as the "whereas" clauses of the WESCs indicate, that support is no longer necessary, as Tri-State has fully relieved its RUS obligations.

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[62] *See, e.g.*, Tri-State Rate Schedule FERC No. 19 (Morgan County Rural Electric Ass'ns, Inc.), Article 3(b) (providing that the Member "agrees that the rates from time to time established by the [Tri-State] Board of Directors … shall be deemed to be substituted for rates currently provided and agrees to pay for electric service furnished by [Tri-State] to it hereunder after the effective date of any such revisions at such revised rates.").

[63] *See, e.g.*, Tri-State Rate Schedule FERC No. 19 (Morgan County Rural Electric Ass'ns, Inc.), Article 1(a).

[64] *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 at P 247 (Oct. 17, 2008).

F. Protest to Tri-State's OATT Order 845 Compliance Filing – Docket No. ER19-2470

Tri-State has submitted changes to its Standard Large Generator Interconnection Procedures ("LGIP") and Standard Large Interconnection Agreement ("LGIA") in compliance with Order No. 845 and Order No. 845-A in a separate docket from the OATT filing addressed above.[65] In the ER19-2470 docket addressing Order No. 845 compliance, Tri-State proposes several deviations from the Commission's *pro forma* LGIP and LGIA, namely a slightly broader definition of "Contingent Facilities," and additional procedures related to Provisional Interconnection Service, Surplus Interconnection Service, and when technological changes would trigger material modifications of an interconnection request. These deviations are generally judged by the same standard as deviations from the Commission's *pro forma* OATT—the filer must show that they are "consistent with or superior to" the *pro forma* LGIP and LGIA the Commission has set forth.[66]

Regarding Contingent Facilities, the addition of the words "and/or planned upgrades not yet in-service"[67] expands the definition beyond that of the pro forma LGIP, which is limited to "unbuilt Interconnection Facilities and Network Upgrades."[68] Thus, apparently, Tri-State will also consider upgrades that have been built but not yet placed in service, and perhaps other upgrades that would not otherwise have been considered interconnection facilities or network upgrades, both of which are defined terms in the LGIP. Given the uncertainty introduced by the injection of the undefined term "planned upgrades not yet in service" into this definition, Tri-State should clarify

[65] *Compare* Transmittal Letter in ER19-2441-000 *with* Transmittal Letter in ER19-2470-000..

[66] *See Public Service Co. of Colorado*, 167 FERC ¶ 61,141 at PP 15-16 (2019).

[67] *See* Transmittal Letter in ER19-2470-000 at 5-6.

[68] *Pro Forma* Large Generator Interconnection Procedures at 2 (updated May 9, 2019), *available at* https://www.ferc.gov/industries/electric/indus-act/gi/stnd-gen/LGIP-procedures.pdf.

how this term is consistent with or superior to the *pro forma* LGIP definition of Contingent Facilities. This is also important to Tri-State's proposal regarding Provisional Interconnection Service, where it proposes adding the Contingent Facilities definition to LGIP section 5.9.2.

G. Protest to Tri-State's Transmission Service Agreements Filing – Docket No. ER19-2474

As discussed above in connection with Tri-State's WESCs, the Commission should devote particular scrutiny to Tri-State's Transmission Service Agreements ("TSAs"). This proceeding represents the first instance in which these contracts have been subject to regulatory review, and the burden is on Tri-State to prove that these contracts meet the "just and reasonable" standard. Recent litigation and publicly-available information calls into question whether contracts between Tri-State and its members are the product of the kind of "fair, arms-length negotiation" that would entitle the contracts to a presumption of justness and reasonableness.[69] If Tri-State's member cooperatives faced a choice between paying an unjust rate for transmission services, and paying an uneconomic exit fee, they may have been unable to truly negotiate a just and reasonable rate. At the very least, Tri-State's filing does not make any attempt to support the justness and reasonableness of the TSAs. Once the Commission has accepted a contract, any later modifications to that contract must be in the "public interest"; it is not sufficient that the modification would result in a just and reasonable rate.[70] Therefore, the Commission must be confident – as a result of the review it undertakes in this proceeding – that the TSAs are just and reasonable. It will not have an opportunity to consider that initial question again.

[69] *See Morgan Stanley Capital Group*, 554 U.S. at 546, 554; *see also, e.g., Delta-Montrose Elec. Ass'n v. Tri-State Generation & Transmission Ass'n, Inc.*, CO PUC Docket 18F-0866E, Formal Complaint of Delta-Montrose Electric Ass'n (filed Dec. 6, 2018).

[70] *See Morgan Stanley Capital Group*, 554 U.S. at 546.

III. REQUEST FOR COMMISSION ACTION

The CoPUC respectfully requests that Commission dismiss the filings presented in the above-captioned dockets on account of their significant procedural, legal, and jurisdictional flaws. In the alternative, the CoPUC respectfully requests that the Commission issue a deficiency letter advising Tri-State of the material omissions in its seven filings. Should the Commission not take either of those actions, the CoPUC respectfully requests that it establish hearing procedures for the many complex issues that cannot be resolved on the face of Tri-State's host of filings.

IV. CONCLUSION

The CoPUC appreciates the Commission's close attention to the numerous issues raised in these proceedings and requests that it dismiss the filings presented in the above-captioned dockets.

Respectfully submitted,

/s/ Suedeen G. Kelly

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Dated: Aug. 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated: Aug. 13, 2019

By: /s/ Max Minzner
Jenner & Block LLP